Supreme Court, U.S.
FILED

96 384 SEP 10 1996

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

LILLIAN WORTHING WYSHAK, PETITIONER

v.

AMERICAN SAVINGS BANK, F.A., ET AL

PETITION FOR WRIT OF WRITS OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA, TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (SECOND APPELLATE DISTRICT DIVISION THREE), and to the APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

This case is related to Supreme Court
of the United States Case No. 96-96
filed July 16, 1996

Lillian Worthing Wyshak
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In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

There are compelling reasons to grant this Petition for Certiorari. State Courts of last resort have decided important questions of federal law that have not been, but should be, settled by this Court. The basic questions are:

1. Whether Federal Rules of Civil Procedure Rule 58 which makes a U.S. District Court Judgment effective only upon entry of the Judgment (here August 24, 1994) makes the date of entry the beginning point for calculation of the seven day prohibition against sale under California Civil Code §2924g(d) so that a Trustee's sale on August 30, 1994, was VOID and should be set aside. (In Re Sambo's Restaurants, 754 F.2d 811 (9th Cir. 1985)).

2. Whether a Default Judgment of Eviction following the sale referred to in the previous paragraph should be set aside as void, not only because of the underlying voidness of the sale but also because the Court, which by statute had subject matter jurisdiction as to property valued up to $25,000.00, did not have subject matter jurisdiction to determine title to a house worth in excess of $1,000,000.00.

3. Whether the California Courts improperly made judgments respecting Petitioners title to her home while respondent's title had not been perfected because the federal court actions involved in Petition for Certiorari No. 96-96 (filed July 15, 1996) were still pending on appeal.

PARTIES TO THE PROCEEDING

Petitioner:

LILLIAN WORTHING WYSHAK

Respondents:

AMERICAN SAVINGS BANK, F.A.
AMERICAN SAVINGS BANK, FA.A. dba AMERICAN SAVINGS BANK
GREGORY V. RUZICKA
LAW OFFICES OF CORDOVA & RUZICKA
THOMAS W. PRATTE
ROBERT BARNUM
MARIO J. ANTOCI
AMERICAN SAVINGS BANK BOARD OF DIRECTORS between January 1, 1994 through January 17, 1995
N.A. MORTGAGE SERVICES, INC.

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RELATED CASE

This case is related to Supreme Court of the United States Case No. 96-96 in which a Petition for Certiorari was filed July 16, 1996. Petitioner respectfully requests that the said Petition for Writ of Certiorari be considered by this Honorable Court in connection herewith.

OPINIONS BELOW

None of the Decisions, Opinions, or Orders in this matter have been reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The underlying justifications are in the Questions Presented for Review and the Statement of the Case.

STATUTES AND RULES INVOLVED

FRCP Rule 54(a) Definition: Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies....

FRCP Rule 58. Entry of Judgment

xxxxx

(2) upon a decision granting other relief.... the Court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.... a judgment is effective only when so set forth and entered as provided in Rule 79(a).

FRCP Rule 79(a)

....all papers filed with the clerk... all appearance orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number.... The entry if an order or judgment shall show the date the entry is made....

California Civil Code §2924g(d)....

However, the sale shall be conducted no sooner than seven days after the earlier of (1) dismissal of the action, or (2) expiration or termination of the injunction, restraining order or stay (which required postponement of the sale), whether by entry of an order by a Court of competent jurisdiction, operation of law, or otherwise under

the injunction, restraining order or subsequent order expressly directs the conduct of the sale within that seven day period.

11 U.S.C. §362(h)

An individual injured by any wilful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

STATEMENT OF THE CASE

This case began on May 26, 1993, with Petitioner's filing of a Voluntary Petition under Chapter 11 of the Bankruptcy Code (Title 11 of the U.S. Code) the day before a scheduled foreclosure sale of Petitioner's home of 28 years, 602 Hillcrest Road, Beverly Hills, California 90210, pursuant to a trust deed on the property held by American Savings Bank.

Foreclosure proceedings had begun when payments on the loan were only two months delinquent. The Bank sought relief from the Stay and it was granted by the Bankruptcy Court on February 7, 1994, as of April 11, 1994 (App., to Petition for Certiorari in Case No. 96-96, at pp. 1-7).

On February 18, 1994, Petitioner appealed to the U.S. District Court from the Order lifting the Stay.

On April 6, 1994, the Stay was extended by the U.S. District Court "until the final determination in the United States District Court of the Appeal filed herein from the Order of the Bankruptcy Court entered on February 11, 1994, and that said Order is hereby vacated. ...Debtor shall pursue her appeal on an expedited basis to be ready for hearing within 60 days." (App., infra, at pp. 20-21).

After a hearing on June 6, 1994, the February 11, 1994, Order of the Bankruptcy Court was affirmed with a 45 day Stay of the Order to allow debtor [Petitioner] to propose and file a Plan of Reorganization. (App., infra, at pp. 22-23).

Petitioner timely filed a proposed Disclosure Statement and Plan pursuant to that Order and a hearing thereon was set in the Bankruptcy Court on September 29, 1994.

Petitioner was prepared to present expert testimony in support of her Plan of Reorganization at the September 29, 1994 Bankruptcy hearing. However, by an Order entered on August 24, 1994, District Court Judge Real denied Petitioner's Motion for Rehearing on his affirmance of the Bankruptcy Court's Order of February 11, 1994, granting relief from the Automatic Stay, and allowing the Bank to proceed with its foreclosure sale of Petitioner's home (subject to the 7 day waiting period of California Civil Code §2924g(d)). (App., infra, at pp. 26-27).

On March 7, 1996, the Ninth Circuit Court of Appeals affirmed the lifting of the Stay without specification of reasons, and denied rehearing on April 17, 1996. (App., to Petition for Certiorari No. 96-96, at pp. 19-23).

With respect to the related adversary action, on January 26, 1994, Petitioner filed in the Bankruptcy Court an adversary complaint entitled "Complaint for Damages; Breach of Implied Covenant of Good Faith and Fair Dealing; Negligent Infliction of Emotional Distress; Intentional Infliction of Emotional Distress; Unconscionability of Contract; Cancellation of Adhesive and Unconscionable Contract Terms; Demand for Jury Trial." On April 21, 1994, the Bankruptcy Court entered its Order Dismissing the Complaint Without Leave to Amend (App., to Petition for Certiorari No. 96-96, at pp. 10-11); which was

affirmed by the United States District Court by Order entered July 21, 1994 (App., to Petition for Certiorari in Case No. 96-96, at pp. 14-15). The Ninth Circuit Court of Appeals affirmed on March 7, 1996, without specifying reasons (App., to Petition for Certiorari No. 96-96, at pp. 19-21) and denied rehearing April 17, 1996 (App., to Petition for Certiorari in Case No. 96-96, at pp. 22-23).

A Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was timely filed as Case No. 96-96 which is now pending.

After Judge Real's Order which was entered August 24, 1994 (App., infra, at pp. 26-27), Respondent American Savings Bank on August 30, 1994 held its foreclosure sale and received a Trustee's Deed dated August 30, 1994 for Petitioner's home.

On September 6, 1994, the Bank initiated an Unlawful Detainer action in the Beverly Hills Municipal Court #94-C02173 (App., infra, at pp. 29-32), which is further referred to below.

On October 18, 1994, Petitioner filed a Complaint for Cancellation of Instrument and for Damages in the Superior Court of the State of California for the County of Los Angeles #SC033218 to set aside the August 30, 1994 Trustee's Deed to respondent on the primary ground that the sale was void under California Civil Code §2924g(d) because it took place while the Automatic Bankruptcy Stay was still in effect or at least that it was within the period after the stay during which a sale was prohibited.

On January 18, 1995 Petitioner filed a First Amended Complaint with an ex parte application for a Temporary Restraining Order and a Preliminary Injunction to prevent the Bank from evicting her from her home of 30 years. Her request was denied. Judge Haber sustained a demurrer to all causes of action (App., infra, pp. 1-2).

The Judgment was affirmed by the Court of appeal of the State of California (App., infra, pp. 3-18).

Petitioner's Petition for Review by the Supreme Court of California was denied on June 12, 1996 (App., infra, p. 19).

On September 6, 1994, American Savings Bank filed its Complaint for Unlawful Detainer against Petitioner in the Beverly Hills Municipal Court, No. 94 C02173 (App., infra, pp. 29-33).

An order evicting Petitioner was made on February 1, 1995 (App., infra, pp. 34-35). The Appellate Department of the Superior Court of the State of California affirmed the judgment (App., infra, pp. 36-42). Under California law there is no appeal from an Appellate Department decision, so a Petition to the Court of Appeal of the State of California for Writ of Mandate was filed by Petitioner on May 31, 1996, but was denied on June 7, 1996 (App., infra, p. 43). A Petition for Review by the Supreme Court of California was denied on July 24, 1996 (App., infra, p. 44).

REASONS FOR GRANTING THE PETITION

THE ALLEGED SALE OF PETITIONER'S HOME ON AUGUST 30, 1994 UNDER CALIFORNIA CIVIL CODE 2924g(d) WAS VOID AND CONSTITUTED A VIOLATION OF THE AUTOMATIC STAY, FOR WHICH PETITIONER IS ENTITLED TO ACTUAL DAMAGES INCLUDING COSTS AND ATTORNEY FEES, AND POSSIBLY PUNITIVE DAMAGES UNDER 11 U.S.C. §362(h).

The August 30, 1994 foreclosure sale to American Savings was VOID. The stay of proceedings under the Bankruptcy Laws of the United States began with the filing of Appellant's Voluntary Chapter 11 Bankruptcy Petition on May 26, 1993. On April 6, 1994, U.S. District Judge Manual Real extended the Stay until "the final determination in the United States District Court of the Appeal." The final determination of the appeal in the United States District Court could have occurred or will occur on either one of two dates:

(a) Upon entry on August 24, 1994, of Judge Real's Order affirming the Order of the Bankruptcy Court lifting the Stay; or

(b) In the future, upon decision following the Petition for Certiorari in case No. 96-96 which is in this Honorable Court.

If "the final determination in the United States District Court of the Appeal" means final determination after a still-to-come judgment, Petitioner should still be living in her home today awaiting that judgement.

If "the final determination in the United States District Court of the appeal" means final determination in the original District Court proceeding, the relevant date was August 24, 1994, the date of entry of Judge Real's Order affirming termination of the stay by Bankruptcy Judge Lax. (FRCP 58, C.C. 2924g(d)). Under this interpretation, the sale could not legally have been made until after August 31, 1994, under C.C. 2924g(d). The sale to American Savings Bank on August 30, 1994, was VOID (In re Sambo's Restaurants, Inc. 754 F.2d 811 (9th Cir. 1985)). Petitioner was illegally evicted under California law and in violation of the Automatic Bankruptcy Stay and is entitled to have her home restored to her and she is entitled to damages for loss of its use and the very severe emotional and physical distress caused to her by American Savings Bank's illegal actions in forcibly evicting her therefrom, as well as costs and attorneys fees and possible punitive damages under 11 U.S.C. §362(h).

United States District Judge Mariana Pfaelzer's Order (App., pp. 24-25) during Judge Real's vacation in response to Appellant's request for a further extension of the Stay in order to allow time for further bankruptcy proceedings did not, and could not terminate, Judge Real's Stay of April 6, 1994. Judge Pfaelzer superimposed her Stay pursuant to Petitioner's request for a Stay which would last until the hearing on her plan of Resignation which was set for September 29, 1994, and Judge Pfaelzer's termination date referred only to the termination of the Stay she herself ordered. It merely served to maintain the status quo until

Judge Real's hearing of August 22, 1994, after his return from vacation. It was Judge Real's Order of August 22, 1994 which was controlling, and which terminated the Automatic Stay, and it was the entry of that Order on August 24, 1994 which made it effective (FRCP Rule 58) and started the running of the seven (7) day period of C.C. 2924g(d). Thus, the seven (7) day period ran until August 31, 1994, and the sale to American Savings Bank on August 30, 1994, was VOID AND OF NO EFFECT. Title to 602 Hillcrest, Beverly Hills, is still in Lillian W. Wyshak as it has been since 1965. The California Court of Appeal's holdings that Judge Pfaelzer's Order terminated the Stay at 3:00 p.m. on August 22, 1994 (App., infra, p. 8) is clearly erroneous.

Another and separate substantive ground for Petitioner's appeal is that Judge Real's ruling implying that Petitioner's Plan of Reorganization was unconfirmable was improperly made by him based on no evidence and was made by him when he was acting in an appellate capacity in Appellant's appeal from the Ruling of the Bankruptcy Court. It was made before any evidentiary hearing was held in the Bankruptcy Court on the Plan. The proper procedure would have been to have the hearing on a plan (then set for September 29, 1994) before the Bankruptcy Court which was the proper fact-finding body. This is one of the points still pending in the Petition for Certiorari in Case No. 96-96.

It is time to restore Petitioner's property to her and to allow her to submit her Plan of Reorganization to the Bankruptcy Court as was supposed to have

been done on September 29, 1994, but which was impossible to do because the heart of the plan, Petitioner's beloved home of 30 years was illegally taken away from her on August 30, 1994 by reason of errors in interpretation of federal law and federal court orders by the California Courts.

To forcibly evict a hardworking and talented professional mother of five children from her home of 30 years following a void sale by a greedy creditor is unconscionable. To snatch the home away during the worst depression when the economy is showing signs of strength whereby Petitioner would, over the normal life of the American Savings Bank loan, be well able to pay it off, shows bad faith and unfair dealing.

Petitioner, at all times believed and still believes that she was entitled to the protection of the Courts in order to save her home. The sale to American Savings Bank was void, the Judgment in the Superior Court's action should be reversed, title should be restored to Petitioner, and she should be allowed to propose a plan of reorganization in the Bankruptcy Court in a proper evidentiary hearing in accordance with the Federal Bankruptcy laws. She should be given substantial damages for having been wrongfully evicted from the home including damages for loss of its use and severe physical and emotional distress, costs, attorneys fees, and possible punitive damages in accordance with U.S.C. §362(h).

THE BEVERLY HILLS MUNICIPAL COURT JUDGMENT IS VOID AND SHOULD BE SET ASIDE.

The subject of this Petition is Petitioner's residence of 30 years (until her eviction therefrom by Respondent American Savings Bank). It is also the subject of the Petition No. 96-96 filed in this Honorable Court on July 15, 1996. The residence was found by Judge Lax to have a value of approximately $2,200,000.00 (Memorandum on Motion for Relief from Stay, App. 3 in Petition for Writ of Certiorari in Case No. 96-96).

The Beverly Hills Municipal Court Judgment for Eviction against Petitioner arose from a foreclosure sale which Petitioner Contends was void and was related to a serious error of California Courts in interpretation of federal law and federal court orders.

The Beverly Hills Municipal Court Judgment was a Default Judgment after an alleged failure by Petitioner to answer the Complaint, which contained the false allegation that American Savings Bank "is the owner of, and is entitled to immediate possession of the real property located within the jurisdictional boundaries of the above-entitled Court in Los Angeles County, California, more particularly described as: 602 Hillcrest Road, Beverly Hills, California 90210"; and that the property was sold to [American Savings Bank] in accordance with §2924 of the [California] Civil Code, under power of sale contained in a Deed of Trust executed by [Lillian W. Wyshak], and title under the sale has been duly perfected in [American Savings Bank]. (app. pp. 24-27).

This judgment is void and should be set aside for several reasons:

(1) The alleged sale to American Savings Bank on August 30, 1994 was void because it was made while the Automatic Bankruptcy Stay was still in effect or during the seven day prohibition against sale after lifting of the Stay, in violation of California Civil Code §2924g(d) and 11 U.S.C. 362(h), as established more fully elsewhere in this Petition.

(2) Respondent's title had also not been perfected because the federal court actions involved in Petition for Certiorari No. 96-96 (July 15, 1996) were still pending on appeal.

(3) Determination of title to a property of a value of over $25,000.00 is beyond subject matter jurisdiction of the Municipal Court pursuant to California Code of Civil Procedure §86 which provides:

Jurisdiction

(a) Each Municipal and justice Court has original jurisdiction of Civil cases and proceedings as follows:

(1) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to twenty-five thousand dollars ($25,000.00) or less....

* * * * *

(4) In proceedings in forcible entry, or forcible or unlawful detainer where the whole amount of damages claimed is twenty-five thousand dollars ($25,000.00) or less.

* * * * *

The value of Petitioner's home which is the subject of this proceeding at all times herein relevant exceeded $1,000,000.00.

The Municipal Court in Case 94 C02173 judgment is therefore void and should be set aside for lack of subject matter jurisdiction.

Eviction of Petitioner was contrary to California law and also constitutes a willful violation of the 11 U.S.C. §362 Stay, for which Petitioner is entitled to actual damages, including costs and attorneys fees, and possible punitive damages under 11 U.S.C. §362(h).

THE CALIFORNIA COURTS IMPROPERLY MADE JUDGMENTS RESPECTING PETITIONERS TITLE TO HER HOME WHILE RESPONDENT'S TITLE HAD NOT BEEN PERFECTED BECAUSE THE FEDERAL COURT ACTIONS INVOLVED IN PETITION FOR CERTIORARI NO. 96-96 (FILED JULY 15, 1996) WERE STILL PENDING ON APPEAL.

CONCLUSION

The Petition for Writs of Certiorari should be granted, directing reversal of the erroneous judgments below and setting aside the void sale of Petitioner's home of 30 years, giving consideration both to this Petition and the Petition in Case No. 96-96 filed in this Honorable Court in July, 1996.

Respectfully submitted,

Lillian Worthing Wyshak

LILLIAN WORTHING WYSHAK
In Propria Persona

September, 1996

DEPT. WE-B

COUNTY OF LOS ANGELES
SUPERIOR COURT OF CALIFORNIA

May 16, 1996

Honorable ALAN B. HABER — JUDGE
Judge Pro Tem

NONE — Deputy Sheriff
Court Attendant

S. SHERWIN — Deputy Clerk
Reporter

NONE — Electronic Recording
Monitor

C033218

LILLIAN WYSHAK

v.

AMERICAN SAVINGS BANK

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

On the matter heretofore submitted to the Court on May 15, 1995, the Court issues the following ruling:

> The Court has taken judicial notice of documents requested for Judicial Notice by Plaintiff and Defendant.
>
> Defendant's Demurrer is sustained as to all 19 causes of action of the First Amended Complaint: All fail to

state a cause of action. The Court finds that the non-judicial foreclosure sale by the trustee occurred eight (8) days after expiration of the Bankruptcy Stay Termination.

Copy of this minute order is mailed this date via U.S. Mail, to counsel as addressed below:

MR. ROBERT WYSHAK
8907 Wilshire Blvd., #201
Beverly Hills, Ca 90211

MR. RICHARD SONTAG
Cordova & Ruzicka
140 Newport Center Dr., #100
Newport Beach, CA 92660

DEPT WEB
MINUTE ENTERED
05/16/95
COUNTY CLERK

MINUTE ORDER

Filed Feb. 28, 1996

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LILLIAN W. WYSHAK,	)	B095493
	)	
Plaintiff and Appellant,	)	(Super. Ct. No. SC033218)
	)	
v.	)	
	)	
AMERICAN SAVINGS BANK,	)	
	)	
Defendant and Respondent.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Haber, Judge. Affirmed.

Robert H. Wyshak for Plaintiff and Appellant.

Cordova & Ruzicka and Richard Sontag for Defendant and Respondent.

Plaintiff Lillian Wyshak appeals the judgment of dismissal entered following the successful demurrer of defendant American Savings Bank (the "Bank") to plaintiff's amended complaint, in which she attached a nonjudicial foreclosure sale of real property. We affirm the judgment.

FACTS

In 1988, plaintiff borrowed money from the Bank. The Bank took as security for the repayment of the loan a deed of trust on plaintiff's longtime Beverly Hills residence (the "Property"). In November 1992, plaintiff defaulted on her loan. Pursuant to the power of sale contained in the deed of trust, the Bank commenced a nonjudicial foreclosure of the Property. The foreclosure sale was automatically stayed by reason of plaintiff's filing of a Chapter 11 bankruptcy action in U.S. Bankruptcy Court, Central District of California.

The Bank sought from the Bankruptcy Court, and was granted, relief from the automatic stay, effective April 11, 1994. That order was upheld on appeal to U.S. District Judge Manuel Real, who on June 20, 1994 issued an order affirming the Bankruptcy Court's ruling and granting plaintiff a 45-day stay of execution in order to propose and file a chapter 11 plan of reorganization. Forty-five days later, on August 8, 1995, plaintiff filed a Disclosure Statement to Plan of Reorganization and a Plan of Reorganization. On August 9, 1994, another order, staying execution of the District Court's June 20, 1994 order, was

issued, which order extended the automatic stay until 3:00 p.m. on August 22, 1994. Plaintiff moved for a rehearing of Judge Real's June 20, 1994 order, which motion was heard and denied on August 22, 1994 and entered on August 24, 1994. That order, based on Judge Real's determination that the Plan of Reorganization submitted by plaintiff was unconformable, reaffirmed the February 11, 1994 Bankruptcy Court ruling granting the Bank relief from the automatic stay.

The Bank acquired the Property at the trustee's sale, held on August 30, 1994. On September 6, 1994, the Bank filed an unlawful detainer action to obtain possession of the Property. After two motions to quash were granted, the Bank sought, and on October 28, 1994 was granted, an order to post and mail the summons and complaint pursuant to the provisions of Code of Civil Procedure section 415.45.

In response to the Bank's service pursuant to the post and mail order, plaintiff filed a third motion to quash, arguing that the Bank had improperly mailed the summons and complaint. On November 22, 1994, the municipal court denied that motion, ruled that plaintiff had been properly served, and ordered her to answer the complaint within five days. On December 6, 1994, plaintiff filed a petition for writ of mandate in the Los Angeles County Superior Court Appellate Department challenging the denial of her motion to quash. That petition was denied on December 22, 1994. Plaintiff did not seek relief in this court.

Instead of filing her answer to the unlawful detainer complaint as ordered by the municipal court, on January 4, 1995 plaintiff filed yet another motion to quash, arguing that the Bank obtained the post and mail order in violation of law. The Bank sought an ex parte order striking plaintiff's fourth motion to quash and entering her default. After a hearing at which both parties were present, the court granted the application, entered a default judgment, and issued a writ of possession. Plaintiff filed a petition for writ of mandate in the Los Angeles County Superior Court Appellate Department challenging, among other things, the municipal court actions in striking the motion to quash and entering default, which petition was denied on February 10, 1995. Again, plaintiff did not seek relief from this court. Shortly thereafter, plaintiff was evicted from the Property.

We now arrive at the point in our story with which we are immediately concerned. For in October 1994, plaintiff filed an action in superior court seeking to have the trustee's deed, by which the Bank acquired title to the Property, declared void. In January 1995, plaintiff filed an amended complaint, transforming her simple lawsuit for cancellation of trustee's deed into no less than 19 causes

of action.[1] Concurrently therewith plaintiff applied for a temporary restraining order, by which she sought to restrain enforcement of the default judgment and writ of possession issued in the unlawful detainer action. The Bank's demurrer to the amended complaint was sustained without leave to amend. It is this ruling that plaintiff appeals.

In the 45-page amended complaint, plaintiff in fact challenges just three aspects of her saga with the Bank. She claims first that the Bank did not acquire good title to the Property at the trustee's sale because that sale was held in violation of Civil Code section 2924g, subdivision (d). Next, plaintiff maintains that the judgment rendered in the unlawful detainer action was void for lack of personal jurisdiction over her, and that her default was improperly entered in that lawsuit. Finally,

---

[1] These included fraud and deceit, conversion, imposition of constructive trust, breach of contract, breach of covenant of good faith and fair dealing, breach of statutory duty, breach of fiduciary duty, slander of title, vacate and set aside void default and default judgment, racketeering, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, cancellation of trustee's deed, quiet title, declaratory relief, preliminary and permanent injunction, abuse of process, and conspiracy, all of which are pleaded in boilerplate language and based solely on the alleged deficiencies in the foreclosure sale.

plaintiff challenges the trial court's denial of her request for a temporary restraining order. None of these contentions are availing.

1. Effective date of expiration of Bankruptcy Court stay

Civil Code section 2924g sets forth the procedure to be followed for the sale of property pursuant to the power of sale contained in a deed of trust. Subdivision (d) of that section provides that a trustee's sale shall be conducted no sooner than seven days after any court-ordered postponement of the sale. Consequently, the trustee's sale of the Property could not occur sooner than seven days after the Bankruptcy Court's automatic stay was lifted.

As mentioned above, the trustee's sale was held on August 30, 1994. Plaintiff contends that the automatic stay was lifted on August 24, 1994, when Judge Real's August 22, 1994 order denying plaintiff's motion for reconsideration and reaffirming the order lifting the stay was entered by the clerk. The Bank counters that, pursuant to the District Court's order of August 9, the stay expired at 3 p.m. on August 22, 1994, eight days before the trustee's sale. The Bank has the better argument.

Plaintiff correctly maintains that a federal court order is effective upon entry by the clerk. (Fed. Rules Civ. Proc., Rule 58.) Judge Real's August 22, 1994 order was therefore effective upon its entry two days later, on August 24, 1994. Plaintiff ignores, however, the District Court order dated August 9, 1994

and entered the following day which provided: "IT IS ORDERED that the STAY OF EXECUTION OF THIS COURT'S ORDER SIGNED JUNE 20, 1994, and entered JUNE 22, 1994, IS EXTENDED UNTIL AUGUST 22, 1994 AT 3:00 p.m." By the terms of this order, the automatic stay expired without any further action at 3:00 p.m. on August 22, 1994. The August 22, 1994 order had no effect upon the stay itself; it merely denied plaintiff's motion for reconsideration, and reaffirmed the court's previous rulings.

The trustee's sale on August 30, 1994, occurring eight days after the expiration of the Bankruptcy Court stay, did not violate the provisions of Civil Code section 2924g, subdivision (d). Consequently, the facts alleged by plaintiff, including the court orders judicially noticed by the trial court, failed to state a cause of action based on the Bank's defective title to the Property; the Bank's demurrer to plaintiff's causes of action based on the Bank's title to the Property was properly sustained.

2. Jurisdictional and other defects in unlawful detainer action

In the ninth cause of action in her amended complaint, plaintiff seeks to vacate and set aside the default and default judgment entered in the municipal court unlawful detainer action, claiming a lack of personal jurisdiction and other errors of law committed by the municipal court.

"A judgment on the merits, which is not void on its face and subject to collateral attack, is protected by the doctrine of res judicata after the time for ordinary direct attack has passed." (8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, §195, p. 594.) Here, the time for ordinary direct attack of the default judgment has passed. The question thus presented is whether plaintiff's complaint states facts sufficient to support a collateral attack on the municipal court's default judgment.

A judgment in an action in which the court had no jurisdiction over the defendant is invalid and may be collaterally attacked, provided that the lack of jurisdiction is apparent from the judgment roll. (Milstein v. Turner (1948) 89 Cal.App.2d 296, 299; see generally, 2 Witkin, Cal. Procedure, supra, Jurisdiction, §80, p. 450, and 8 Witkin, Cal. Procedure, supra, Attack on Judgment in Trial Court, §6, pp. 410-411, and cases cited therein.) This rule is subject, however, to a pertinent exception: When the issue of personal jurisdiction has been raised by the defendant and ruled on by the trial court, the judgment is not subject to collateral attack, but can only be attacked directly, that is, by appeal, writ, or other method of direct review. (2 Witkin, Cal. Procedure, supra, Jurisdiction, § 278, p. 684.) Here, after denying her third motion to quash, the municipal court determined that plaintiff had been personally served in the unlawful detainer action and that the court had personal jurisdiction over her. Plaintiff's writ petition challenging that finding was denied, and plaintiff did not pursue further review of that finding in

this court. Thus, the municipal court's determination that it had personal jurisdiction of plaintiff is final and not subject to attack in this proceeding.

Plaintiff also challenges additional orders of the municipal court on various grounds. As noted above, however, it is well established that a judgment may be collaterally attacked only on the basis of jurisdictional defects which appear on the judgment roll. (8 Witkin, Cal. Procedure, supra, Attack on Judgment in Trial Court, §6, p. 410; Milstein v. Turner, supra, 89 Cal.App.2d at p. 299.) Plaintiff's additional attacks on the default judgment constitute purported irregularities in the trial court proceedings which do not deprive the court of jurisdiction.[2]

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[2] For example, plaintiff seeks to invalidate the post and mail order by attacking as perjurious the contents of the declaration in support of the application for the order. In so doing, plaintiff castigates the Bank for failing to serve her counsel with the application, an action plaintiff describes as a "flagrant" violation of Code of Civil Procedure section 465, for which she recommends sanctions. Section 465 of the Code of Civil Procedure provides: "Except with leave of the court, all pleadings subsequent to the complaint, together with proof of service unless a summons need be issued, shall be filed with the clerk or judge, and copies thereof served upon the adverse party or his or her attorney." We discern in the Bank's behavior no violation of the quoted statute.

Consequently, those irregularities, including the municipal court's supposed errors in issuing the post and mail order, in striking the motion to quash, and in entering default, are not subject to collateral attack. (Ibid). Consequently, the amended complaint fails to state a cause of action with respect to the judgment and orders entered by the municipal court, and the demurrer was properly sustained as to plaintiff's ninth cause of action.

3. Temporary restraining order

Finally, plaintiff relies on Asuncion v. Superior Court (1980) 108 Cal.App.3d 141 to challenge the trial court's denial of her request for a temporary restraining order to enjoin the unlawful detainer action until title issues were resolved in superior court.

In Asuncion, W.C. Financial, Inc. ("Financial") acquired title to petitioners' property through a loan transaction after petitioners had defaulted on their mortgage. Financial instituted an unlawful detainer action in municipal court. Petitioners challenged Financial's title to the Property, claiming that Financial fraudulently induced them to enter into the loan transaction and to transfer title to their property to Financial. Petitioners successfully moved the municipal court to transfer the action to the superior court on the ground that title to real property worth more than the jurisdictional limit of the court was at issue. Petitioners also filed a complaint in superior court alleging, among other things, fraud, usury, unfair business practices, truth-

in-lending violations, and undue influence, and requesting, among other things, that title be quieted in their favor. Thereafter, the corporation, apparently arguing that only the municipal court has jurisdiction of unlawful detainer actions, obtained an order of the superior court re-transferring the eviction action to municipal court. (108 Cal.App.3d at pp. 142-143.)

The question before the appellate court in Asuncion was the proper timing and forum for resolution of the ownership issues raised by the parties where the value of the property in question exceeded the jurisdictional limits of the municipal court. While recognizing the summary nature of unlawful detainer proceedings and the limited defenses applicable thereto, the court ruled that "homeowners cannot be evicted, consistent with due process guaranties, without being permitted to raise the affirmative defenses which if proved would maintain their possession and ownership." (Asuncion v. Superior Court, supra, 108 Cal.App.3d at p. 146.) Consistent with that principal, the court in Asuncion issued a writ of mandate ordering that the unlawful detainer matter be heard in superior court, since the value of the title in question exceeded the jurisdiction of the municipal court.[3]

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[3] The court also suggested alternative means of achieving this result, such as staying the eviction proceedings until trial of the fraud action, or consolidating the two lawsuits.

The rationale of Asuncion makes eminently good sense. A homeowner should not be evicted from her home in a summary proceeding when she has affirmative defenses to the action which if proved would establish her superior title to the property. The rule of Asuncion has no application, however, to the facts before us. Plaintiff had every opportunity to raise the purported defects in the Bank's title in defense of the unlawful detainer action. Asuncion would have provided good authority for plaintiff to request the municipal court to transfer the eviction action to superior court, or to request the superior court to enjoin prosecution of the unlawful detainer action until any title issues had been resolved.[4] Plaintiff made neither request. Instead, she failed to raise any defense to the eviction action, and a default judgment was entered against her. Asuncion provides no authority for a superior court to enjoin enforcement of a municipal court judgment, as sought by plaintiff here.

4. Remaining causes of action

Plaintiff's opening brief lists additional "points on appeal" with respect to the remaining causes of action set

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[4] Here, of course, plaintiff did not claim that the loan transaction was fraudulent, nor that the deed of trust securing her home was invalid, nor that she did not owe the Bank the money. Rather, plaintiff's sole challenge to the Bank's title was a technical one: that the foreclosure sale was held one day early.

forth in her amended complaint, but makes no argument regarding the vitality of these causes of action. We therefore deem any assignments of error with respect to these unbriefed causes of action waived. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ARMSTRONG, J.

We concur:

GRIGNON, Acting P.J.

GODOY PEREZ, J.

Filed March 28, 1996

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LILLIAN W. WYSHAK,	)	B095493
	)	
Plaintiff and Appellant,	)	(Super. Ct. No. SC033218)
	)	
v.	)	
	)	ORDER MODIFYING
AMERICAN SAVINGS BANK,	)	OPINION AND DENYING REHEARING
	)	
Defendant and Respondent.	)	[No Change In Judgment]
	)	

THE COURT:*

It is ordered that the opinion filed herein on February 28, 1996, be modified in the following particulars:

On page 2, line 6 of the third paragraph, the year "1995" is changed to "1994".

On page 3, line 3 of the second paragraph, the entire sentence beginning "On November 22, 1994, the municipal court denied that motion..." is deleted and it is amended to read:

> On November 22, 1994, the municipal court denied that motion and ruled that plaintiff had been property served.

On page 3, the last sentence of the second paragraph is deleted and changed to read as follows:

> Plaintiff did not seek relief in this court, nor did she file her answer to the unlawful detainer complaint as prescribed by Code of Civil Procedure Section 418.10, subdivision (c).

On page 3, the first sentence of the third paragraph is deleted and changed to read as follows:

> Instead, on January 4, 1995, plaintiff filed yet another motion to quash, arguing that the Bank obtained the post and mail order in violation of law.

On page 6, the following sentence is added at the end of the first paragraph:

> Thus, notwithstanding that the default judgment is currently on direct appeal in the Appellate Department of the Superior Court, we must determine whether plaintiff's complaint states facts sufficient to support a collateral attack on the municipal court's default judgment.

On page 6, the second full paragraph is deleted in its entirety.

On page 6, the last line on the page, the words "final and" are deleted so that the sentence reads:

> Thus, the municipal court's determination that it had personal jurisdiction of plaintiff is not subject to attack in this proceeding.

On page 7, lines 10 and 11 of the first paragraph, the words "with respect to" are deleted and the words "to vacate and set aside" are inserted so that the sentence reads:

> Consequently, the amended complaint fails to state a cause of action to vacate and set aside the judgment and orders entered by the municipal court, and the demurrer was properly sustained as to plaintiff's ninth cause of action.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

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*ARMSTRONG, J. GRIGNON, J. Acting P.J.
GODOY PEREZ, J.

Filed June 12, 1996
Robert Wandruff Clerk Deputy

Second Appellate District

Division Five

No. B095493

S052813

IN THE SUPREME COURT OF CALIFORNIA

LILLIAN W. WYSHAK, Appellant

v.

AMERICAN SAVINGS BANK, Respondent

Appellant's petition for review DENIED.

GEORGE
Chief Justice

Filed Apr. 6, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re	District Court Case No. 94-1607R
LILLIAN WORTHING WYSHAK,	Case No. LA 93-28978 KL
Debtor.	Chapter 11
	ORDER EXTENDING AUTOMATIC STAY
AMERICAN SAVINGS BANK, F.A.,	
Movant,	
LILLIAN W. WYSHAK,	
Respondent-Appellant	

The Court has considered the EX PARTE APPLICATION TO EXTEND AUTOMATIC STAY PENDING APPEAL and REQUEST FOR JUDICIAL NOTICE; the Automatic Stay imposed against American Savings Bank as of May 26, 1993, the date of the filing of debtor's Voluntary Petition for Bankruptcy (Chapter 11); the Bankruptcy Court's MEMORANDUM ON MOTION FOR RELIEF FROM STAY and ORDER THEREON; the DECLARATION OF LILLIAN W. WYSHAK wherein it appears that American

Savings Bank will commit the acts restrained by the Automatic Stay, namely, will sell the home of Lillian W. Wyshak, debtor-appellant, on April 12, 1994, unless the stay is extended.

It further appears that Lillian Worthing Wyshak, debtor, will suffer immediate and irreparable injury, loss and damage, unless said stay is extended until the final determination of her appeal from said order, in that she will be divested of her unique home the loss of which cannot be adequately compensated for by money damages and with respect to which she has no adequate remedy at law.

IT IS ORDERED that the Automatic Stay be extended until the final determination in the United States District Court of the appeal filed herein from the Order of the Bankruptcy Court entered on February 11, 1994; and that said order is hereby vacated. Furthermore, the Request for Judicial Notice is granted. Debtor shall pursue her appeal on an expedited basis to be ready for hearing within 60 days.

Dated: April 6, 1994

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

Filed June 20, 1994
Entered June 22, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	District Court Case No. 94-1607R
LILLIAN W. WYSHAK,	Case No. LA 93-28978 KL
Debtor.	MO 93-02429
	Chapter 11
AMERICAN SAVINGS BANK, F.A., Movant, Appellee	**ORDER AFFIRMING BANKRUPTCY COURT'S ORDER ENTERED 2/11/94, AND DENYING REQUEST FOR CONTINUANCE; ORDER GRANTING REQUEST FOR JUDICIAL NOTICE; ORDER EXTENDING STAY OF 11 USC §362 FOR 45 DAYS**
vs.	
LILLIAN W. WYSHAK, Respondent, Appellant	

This matter duly came on for hearing in the Courtroom of the Honorable Manuel L. Real, United States District Judge, on June 6, 1994. Debtor appeared In Propria Persona, and American Savings Bank was represented by Emily Miller, Esq. of Pircher, Nichols & Meeks.

The Court has considered APPELLANT'S APPEAL FROM THE ORDER OF THE BANKRUPTCY COURT ENTERED February 11, 1994; APPELLANT'S APPLICATION FOR CONTINUANCE OF FINAL HEARING ON BANKRUPTCY APPEAL AND FOR AN ORDER EXTENDING AUTOMATIC STAY OF §362; REQUEST FOR JUDICIAL NOTICE; DECLARATION OF LILLIAN WORTHING WYSHAK and POINTS AND AUTHORITIES filed herein on June 6, 1994; the AUTOMATIC STAY imposed against American Savings Bank as of May 26, 1993, the date of the filing of Debtor's Voluntary Petition for Bankruptcy (Chapter 11); the ORDER EXTENDING AUTOMATIC STAY entered herein on April 7, 1994; and the Notice of Entry of a Notice of Appeal on June 2, 1994, in a related case in the same Bankruptcy case numbered AD 94-01024, which has been assigned District Court Case No. CV 94-3649-IH.

IT IS ORDERED that the Order of the Bankruptcy Court entered February 11, 1994, granting relief from stay under 11 U.S.C. §362(d)(1) is affirmed; and debtor's application for continuance of the final hearing of debtor's appeal therefrom is denied; PROVIDED, HOWEVER, that EXECUTION OF THIS ORDER IS STAYED FOR 45 DAYS IN ORDER TO ALLOW DEBTOR TO PROPOSE AND FILE A PLAN OF REORGANIZATION.

Appellant's Request for Judicial Notice is granted.

Dated: June 20, 1994

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

Filed August 9, 1994
Entered August 9, 1994

LILLIAN W. WYSHAK
8907 Wilshire Blvd., #201
Beverly Hills, CA 90211
In Pro Per
(310) 273-0223

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	District Court Case No. 94-1607R
LILLIAN W. WYSHAK,	Case No. LA 93-28978 KL
Debtor.	MO 93-02429
	Chapter 11
AMERICAN SAVINGS BANK, F.A., Movant, Appellee	**ORDER EXTENDING STAY**
vs.	
LILLIAN W. WYSHAK, Respondent, Appellant	

The Court has considered Debtor's EX PART MOTION TO EXTEND STAY OF THIS COURT'S

ORDER ENTERED ON 6/22/94; DECLARATION OF LILLIAN W. WYSHAK; POINTS AND AUTHORITIES; IT'S ORDER AFFIRMING BANKRUPTCY COURT'S ORDER ENTERED 2/11/94, AND DENYING REQUEST FOR CONTINUANCE; ORDER GRANTING REQUEST FOR JUDICIAL NOTICE; ORDER EXTENDING STAY OF 11 USC §362 FOR 45 DAYS and documents and matters referred to therein; and it appearing that American Savings Bank will commit the acts restrained by the said ORDER EXTENDING STAY and the previous Automatic Stay imposed against American Savings Bank as of May 26, 1993, the date of the filing of debtor's Voluntary Petition for Bankruptcy (Chapter 11), namely American Savings Bank will sell the home of Lillian W. Wyshak, debtor-appellant on August 16, 1994, unless the Stay is extended or a new stay is imposed; and It further appears that Lillian Worthing Wyshak, debtor, will suffer immediate and irreparable injury, loss and damage, unless said stay is extended or a new stay is imposed until the final determination of the Courts on confirmation of Debtor's Plan of Reorganization and Disclosure Statement to Plan of Reorganization dated August 8, 1994, copies of which were submitted with the Ex Parte Motion filed on that date.

IT IS ORDERED that the STAY OF EXECUTION OF THIS COURT'S ORDER SIGNED JUNE 20, 1994, and entered JUNE 22, 1994, IS EXTENDED UNTIL AUGUST 22, 1994 AT 3:00 P.M.

Dated: Aug. 9, 1994

M. R. Pfaelzer
UNITED STATES DISTRICT JUDGE
for Manuel L. Real

Filed Aug. 22, 1994
Entered Aug. 24, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re:	District Court Case No. CV-94-3649-R
LILLIAN WORTHING WYSHAK,	
Debtor-in-Possession.	Bankruptcy Court Case No. LA 93-28978 KL
	Chapter 11
AMERICAN SAVINGS BANK, F.A.,	**ORDER DENYING APPELLANT'S MOTION FOR REHEARING AND FURTHER AFFIRMING BANKRUPTCY COURT'S ORDER OF 2/11/94 GRANTING RELIEF FROM THE AUTOMATIC STAY**
Movant/Respondent,	
vs.	
LILLIAN WORTHING WYSHAK,	
Respondent/Appellant,	DATE: 8/22/94 TIME: 10:00 A.M. COURTROOM: 8

A hearing was held on Respondent/Appellant Lillian Worthing Wyshak's Motion for Rehearing on this Court's affirmance of the Bankruptcy Court's Order of February 11, 1994, granting relief from the automatic stay, at 10:00 a.m. on August 22, 1994, before the Honorable Manuel L. Real, District Court Judge presiding, in Courtroom 8 of

the above-entitled court, located at 312 N. Spring Street, Los Angeles, California. Respondent/Appellant Lillian Worthing Wyshak ("Wyshak") appeared In Pro Per, and Movant/Respondent American Savings Bank, F.A. ("ASB"), appeared by attorney Richard Sontag.

The Court having considered the various papers on file in this matter and in Appellant's Chapter 11 bankruptcy case, and the argument of counsel, and good cause appearing:

IT IS HEREBY ORDERED that Wyshak's Motion for Rehearing regarding this Court's affirmance of the Bankruptcy Court's Order of February 11, 1994, granting ASB relief from the automatic stay, is denied.

IT IS FURTHER ORDERED that the Bankruptcy Court's Order of February 11, 1994, granting ASB relief from the automatic stay, is hereby reaffirmed, the automatic stay in Wyshak's Chapter 11 bankruptcy is hereby immediately terminated and ASB may continue, and conclude, its non-judicial foreclosure of the subject property commonly known as and located at 602 Hillcrest Road, Beverly Hills, California 90210, and which is more particularly, and legally, described in Exhibit "A" attached hereto ~~including a waiver of the seven (7) day waiting period contained in California Civil Code §2924(d)~~.

Dated: Aug. 22, 1994

Manuel L. Real
Manuel L. Real
U.S. District
Court Judge

American Saving Bank, F.A., v. Wyshak
District Court Case #CV-94-1607-R
Chapter 11 Bankruptcy Case #LA 93-28978 KL

EXHIBIT "A" TO DISTRICT COURT'S ORDER DENYING MOTION FOR REHEARING

[Legal Description of Subject Property]

Lot 1 in Block 105 of Beverly Hills, in the City of Beverly Hills, in the County of Los Angeles, State of California, as per Map recorded in Book 85 Pages 86 to 92 inclusive of maps, in the office of the County Recorder of said county.

Filed Sept. 6, 1994
Entered Sept. 6, 1994

GREGORY V. RUZICKA (State Bar NO. 98463)
CORDOVA & RUZICKA, Attorneys at Law
130 Newport Center Drive, Suite 100
Newport Beach, CA 92660
(714) 759-1080

Attorneys for Plaintiff

MUNICIPAL COURT OF CALIFORNIA

COUNTY OF LOS ANGELES,

BEVERLY HILLS JUDICIAL DISTRICT

AMERICAN SAVINGS BANK,	)	CASE NO. 94C02173
Plaintiff,	)	**COMPLAINT FOR UNLAWFUL DETAINER AGAINST PERSONS HOLDING OVER AFTER SALE UNDER DEED OF TRUST**
vs.	)	
LILLIAN W. WYSHAK,	)	
DOES 1 through 20, inclusive,	)	[C.C.P. Sec. 1161a]
Defendants	)	

COMES NOW, Plaintiff, AMERICAN SAVINGS BANK, and for its cause of action against Defendants, and each of them, alleges as follows:

FIRST CAUSE OF ACTION

(FOR UNLAWFUL DETAINER
AGAINST ALL DEFENDANTS)

1. Plaintiff is, and at all times mentioned herein, was a Corporation duly licensed and authorized to do business in the State of California.

2. Plaintiff is informed and believes and thereon alleges that the Defendants and each of them, are, and at all times herein mentioned, were residents of the County of Los Angeles, State of California, and reside within the jurisdictional boundaries of this Court.

3. The true names and capacities whether individual, corporate, associate or otherwise of the Defendants named herein as Does 1 through 20, inclusive, are unknown to Plaintiff who therefore sues said Defendants by such fictitious names. Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of said Defendants when ascertained.

4. Plaintiff is informed and believes, and thereon alleges that the Defendants and each of them, are, and at all times mentioned herein were, the agent, servant and employee of each of the other Defendants, and in doing the things herein alleged, was acting within the course and scope of said agency and employment.

5. Plaintiff is the owner of, and is entitled to immediate possession of the real property located within the jurisdictional boundaries of the above-

entitled Court in Los Angeles County, California, more particularly described as: 602 Hillcrest Road, Beverly Hills, CA 90210.

6. The property was sold to Plaintiff in accordance with Section 2924 of the Civil Code, under power of sale contained in a deed of trust executed by the Defendant(s) herein, and title under the sale has been duly perfected in Plaintiff.

7. On September 1, 1994, Plaintiff caused to be served upon Defendants, and each of them, written notice each of them to quit and deliver up possession of the premises to Plaintiff within Three (3) days after service of said notice.

8. More than Three (3) days have elapsed since the service of said notices, but Defendants, and each of them have failed and refused to deliver up possession of said premises to Plaintiff.

9. The reasonable rental value of the use and occupancy of said premises is the sum of $166.66 per day, and damages to Plaintiff caused by Defendants' unlawful detention thereof have accrued at said rate since September 5, 1994, and will continue to accrue at said rate so long as Defendants, and each of them, remain in possession of said premises.

WHEREFORE, Plaintiff prays Judgment against Defendants, and each of them, as follows:

1. For restitution of the premises;

2. For damages at the rate of $166.66 per day from, September 5, 1994, for each day that Defendants, and each of them, continue in possession of said premises;

3. For costs of suit incurred herein; and

4. For such other and further relief as the Court deems just and proper.

Dated: September 6, 1994

CORDOVA & RUZICKA

GREGORY V. RUZICKA
Attorney for PLAINTIFF

VERIFICATION BY ATTORNEY

I am an attorney at law admitted to practice before all courts of the State of California and have my office in Orange County, California, and am the attorney for Plaintiff in the above entitled action, that all of the officers of the Plaintiff are unable to make the verification because they are absent from said county and for that reason affiant makes this verification on Plaintiff's behalf; that I have read the foregoing complaint and am informed and believe that the matters stated herein are true.

Executed on Sept. 6, 1994 at NEWPORT BEACH, California.

I certify under penalty of perjury that the foregoing is true and correct.

GREGORY V. RUZICKA
Attorney for PLAINTIFF

MUNICIPAL COURT OF THE BEVERLY HILLS JUDICIAL DISTRICT (19420)
9355 BURTON WAY, BEVERLY HILLS, CA 90210
Telephone: (310) 288-1213

AMERICAN SAVINGS BANK
vs.
WYSHAK, LILLIAN W. Case Number: 94C02173

MINUTE ORDER and CLERK'S NOTICE OF RULING

Court convened at 01:30 PM, on 01/12/95; in Division 001
Present: Honorable ELDEN S FOX, Judge/Comm. Presiding.
NANCY RHODES, Deputy Clerk;
and the following proceedings were had:

Plaintiff(s) AMERICAN SAVINGS BANK appearing by RICHARD SONTAG
Defendant(s)
WYSHAK, LILLIAN W. appearing by ROBERT H. WYSHAK

NATURE OF PROCEEDINGS: CAUSE CALLED FOR HEARING RE: EX PARTE ORDER STRIKING DEFENDANT'S FOURTH MOTION TO QUASH, AND ENTERING DEFAULT

DISPOSITION: THE COURT RULES AS FOLLOWS:

THAT DEFENDANT LILLIAN WYSHAK'S FOURTH MOTION TO QUASH SERVICE OF SUMMONS AND COMPLAINT FOR U.D. HEREIN IS STRICKEN AS IMPROPER. IT IS FURTHER ORDERED THAT DEFAULT BE ENTERED AGAINST DEFT. LILLIAN WYSHAK, AND THAT AN IMMEDIATE WRIT OF POSSESSION BE ISSUED IN PLAINTIFF'S FAVOR.

The foregoing minutes are correct.

PATRICIA BOULWARE
Deputy Clerk

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I am the Clerk of this Court, not a party to this cause, that I served a copy of this NOTICE on the below date, by placing a copy thereof in separate sealed envelope(s) addressed to:

GREGORY V. RUZICKA
CORDOVA & RUZICKA, ATTORNEYS AT LAW
130 NEWPORT CENTER DRIVE, SUITE 100
NEWPORT BEACH, CA 92660

ROBERT H. WYSHAK
ATTORNEY AT LAW
8907 WILSHIRE BLVD., SUITE 201
BEVERLY HILLS, CA 90211

at the address shown by the records of this Court, and by then sealing said envelope(s) and depositing same with postage prepaid thereon, in the United States mail at BEVERLY HILLS, CALIFORNIA.

JOSE GUILLEN,
Court Administrator/Clerk

Dated: 02/01/95

By PATRICIA BOULWARE,
Deputy

Filed April 10, 1996
Entered

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF L.A.

AMERICAN SAVINGS BANK,	)	Superior Ct. N. BV 20889
Plaintiff and, Respondent,	)	Municipal Court of the Beverly
vs.	)	Hills Judicial Dist.
LILLIAN W. WYSHAK,	)	No. 94C02173
Defendant and Appellant.	)	**MEMORANDUM JUDGMENT**

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed. Respondent to recover costs on appeal.

Defendant Lillian Wyshak (hereinafter "appellant") appeals from the default judgment entered against her in this unlawful detainer action filed by plaintiff American Savings Bank (hereinafter "respondent") following a nonjudicial foreclosure sale of the subject property.

PROCEDURAL FACTS

In the instant matter, appellant twice successfully moved the trial court

for an order quashing service of summons and complaint. Thereafter, respondent succeeded in obtaining an order from the trial court allowing respondent to "post and mail" service of summons and complaint, pursuant to Code of Civil Procedure[1] section 415.45. Respondent then served notice of summons and complaint by way of the post and mail manner. Appellant moved the court for a third order quashing service of summons and complaint, contending the mailing was ineffective because it was mailed certified with a return receipt requested, rather than simply certified. This motion to quash was denied on November 22, 1994, and it appears from other court orders that appellant was given five days to answer.[2] Appellant did nothing until December 5, 1994, when she filed a writ of mandate with this court. On December 9, 1994, respondent requested and received an entry of appellant's default in the unlawful detainer action. Appellant's writ was denied December 22, 1994. Again appellant did nothing until January 4, 1995, when she filed yet another motion to quash service of summons and complaint,

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1. All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

2. The record on appeal does not contain any order or minute order concerning this motion to quash. The minute order of January 12, 1995, states that defendant was given five days on November 22, 1994, to answer to unlawful detainer complaint.

which was actually a motion for reconsideration of the trial court's earlier denial of her motion to quash. This motion was denied, and at respondent's request, default judgment was entered against appellant. Therefore, appellant timely file this appeal.

DUTY TO SERVE COUNSEL

Appellant first contends respondent committed error by failing to serve her attorney with notice of their intent to move the trial court for an order allowing "post and mail" service of summons and complaint. However, appellant having avoided service of the complaint in this case, was not yet a party to the action, and therefore respondent was not required to serve her attorney. If it were otherwise, it would appear proper that respondent could merely serve her attorney with a copy of the summons and complaint, and that would constitute effective service upon appellant herself. No notice was required in this instance.

ISSUANCE OF THE POST AND MAIL ORDER

Appellant contends the post and mail order was not properly made, because the declaration in support of the order was insufficient. The declaration, found in the record on appeal only as an exhibit attached to appellant's renewed motion to quash (filed January 4, 1995), is by respondent's attorney of record Gregory Ruzicka. Our review of this declaration convinces us that, despite appellant's contentions to the contrary, the declaration was sufficient to permit the trial court to issue its order allowing

posting and mailing of the summons and complaint. Thus, when respondent successfully completed the posting and mailing of the summons and complaint, the trial court had jurisdiction to make further orders in this matter.

PROPERTY OF ENTRY OF DEFAULT

Appellant also contends the trial court improperly entered appellant's default on December 9, 1994, while a writ of mandate was pending in superior court. However, a review of applicable dates indicates that appellant failed to file his writ within the time required for answering the complaint.

On November 22, 1994, the court denied appellant's third motion to quash service and ordered appellant to file an answer within five days. Section 1167.4 provides that if a motion to quash is denied, the defendant is given five days to answer from the date of service upon her of the written notice of entry of an order denying her motion.[3] The record on appeal contains no order for November 22, 1994, nor does it contain proof of any written notice served on appellant. It is appellant's burden to furnish us with a

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3. Appellant contends he was allowed 15 days to answer or, in this cases, file his writ, under section 418.10. However, in unlawful detainer actions, the shorter time limits of section 1167.4 apply. (See, Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 1995) § 3.393, p. 3-93.)

record that is adequate to consider the contentions on appeal. (**Hamwi** v. **Citinational-Buckeye Inv. Co.** (1977) 72 Cal.App.3d 462, 474.) The present state of the record is inadequate for this court to conclude any error occurred, or that appellant was allowed more than the five days ordered for answering the complaint. Because appellant failed to answer the complaint or file any pleading or motion until 13 days after the denial of her motion to quash service (from November 22, 1994 to December 5, 1994), the time allowed for responding to the complaint had expired, and respondent properly requested and received entry of appellant's default on December 9, 1994.[4]

EX PARTE MOTION TO STRIKE RENEWED MOTION TO QUASH

On January 4, 1994, following the denial of her writ of mandate, appellant filed a renewed motion to quash service of the summons and complaint. The hearing on the motion was scheduled for January 12, 1995. On January 10, 1995, respondent filed an ex parte application for an order striking appellant's motion to quash, to be heard January 11, 1995. From the record on appeal, it does not appear anything occurred on January 11, 1995. On

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4. Contrary to respondent's contention, the record indicates respondent requested and the court entered default on December 9, 1994. On January 12, 1995, the court entered default judgment.

January 12, 1995, the minute order indicates appellant's motion was heard and denied, and then that it was stricken. It is unclear why respondent would attempt to have the motion stricken only one day before it was to be heard on its merits, but it appears the trial court treated respondent's ex parte application to strike as an opposition to appellant's motion. Appellant contends the ex parte application was improper; however, it does not appear the trial court acted on the ex parte application, and that appellant's renewed motion to quash was heard and denied on its merits. Therefore, appellant suffered no harm of which she can complain on appeal. We therefore refuse further consideration of this contention.

FAILURE TO ALLOW APPELLANT THE OPPORTUNITY TO ANSWER

Appellant contends she should have been allowed the opportunity to answer the complaint, assert her affirmative defenses, and have the unlawful detainer action heard on its merits. Appellant fails to perceive that she was given the opportunity to answer the complaint and proceed to trial, but that she continually attempted to avoid that course of action. Her conduct resulted in her failing to answer the complaint in a timely manner. The trial court is not to be faulted for appellant's failures in this regard, for the trial court committed no errors. The trial court properly entered appellant's default and default judgment when she failed to answer after being given an opportunity. Appellant never moved the trial court to set aside the default.

Accordingly, the judgment is affirmed.[5]

Roberson, P.J.

We concur.

Johnson, J.

Kakita, J.

5. Appellant's motion for permission to file a supplemental brief, made Monday, March 25, 1995, is denied as being made without good cause. (Cal. Rules of Court, rule 137).

Filed June 7, 1996
Joseph A. Lane, Clerk

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LILLIAN W. WYSHAK,	)	No. B102481
Petitioner,	)	(Super. Ct. No. BV20889)
vs.	)	(Mun. Ct. No. 94C02173)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	)	
Respondent.	)	
AMERICAN SAVINGS BANK,	)	
Real Party in Interest.	)	

THE COURT*:

The court has read and considered the petition for writ of mandate filed herein May 31, 1996. The petition is denied.

*LILLIE, P.J. JOHNSON, J., WOODS, J.

Filed July 24, 1996
Robert Wandruff, Clerk

Second Appellate District
Division Seven, No. B012481
S054315

IN THE SUPREME COURT OF CALIFORNIA

LILLIAN W. WYSHAK, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

AMERICAN SAVINGS BANK,
Real Party In Interest

Petition for review DENIED.

GEORGE
Chief Justice